SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 1077

CLAUDE WALLACE, *Petitioner*,

—

J. EDWARD DAY, POSTMASTER GENERAL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision, Statute and Postal Manual Involved	3
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	9
Appendix A	10
Appendix B	11
Appendix C	13
Appendix D	14

Table of Cases Cited

Dew v. Halaby, 317 F. 2d 582	7

Miscellaneous

Tit. 28 U.S. Code, sec. 1254(1)	2
Sec. 14 of the Veterans' Preference Act, (58 Stat. 390, as amended 5 U.S.C. 863)	2
Sec. 744.12 of the Postal Manual	3
Declaratory Judgments Act, 28 U.S.C., Sec. 2201	5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia granting summary judgment for the respondents.

Opinion Below

Copy of order of the District Court, dated May 23, 1963 granting defendant's motion for summary judgment is appended hereto as Appendix A. There was no written opinion rendered by that Court. The opinion of the Court of Appeals is reported at 328 F. 2d 565 (1964) and is appended hereto as Appendix B. The judgment is appended hereto as Appendix C.

Jurisdiction

The jurisdiction of the Court is invoked pursuant to the provisions of Tit. 28, U.S. Code, sec. 1254(1).

Questions Presented

Under Sec. 14 of the Veterans' Preference Act, (58 Stat. 390, as amended 5 U.S.C. 863), a preference eligible who has completed his probationary or trial period of government employment may be discharged only "for such cause as will promote the efficiency of the service." The questions here presented are:

1. Is a discharge of a preference eligible, (who has completed his probationary period, and performed over eighteen years of satisfactory government service) for such cause as will promote the efficiency of the service, when said discharge is made on account of alleged conduct which occurred while the employee was not engaged in his Federal employment?

2. Were the respondents legally authorized to discharge petitioner under the provisions of Sec. 744.12 of the Postal Manual which specifically does not provide for dismissal, and the petitioner not being charged with violation of any relevant regulations of the respondent Civil Service Commission herein?

3. Were the respondents legally authorized to recharge petitioner for soliciting males and disorderly conduct when he had already been acquitted of such charges by a Court of competent jurisdiction?

4. Were the actions of the respondents arbitrary, capricious or unreasonable?

Constitutional Provision, Statute and Postal Manual Involved

Article IV, Section 1, United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Sec. 744.12 of the Postal Manual reads as follows:

> "744.12. To be subject to higher requirements. Postal employees are servants of the general public and their conduct, in many instances, must be subject to more restrictions and to higher standard than may be for certain private employments. Employees are expected to conduct themselves during and outside of working hours in a manner which will reflect favorably upon the postal service. Although it is not the policy of the Post Office Dept. to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, and of good character and reputation."

Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, as amended 5 U.S.C. 863, provides as follows:

> "863. Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.
>
> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed

in the civil service, or in any establishment, agency, bureau administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank of compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance; or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory

for such administrative officer to take such corrective action as the Commission finally recommends . . .

Statement of the Case

Petitioner, an honorably discharged veteran of World War I, was employed by the Post Office Department since 1944 as a clerk in the Chicago Post Office. He was entitled to the benefits of the Veterans Preference Act, *supra*. The District Court had jurisdiction under the Declaratory Judgments Act, 28 U.S.C., Sec. 2201, to restore petitioner to his permanent position with back pay.

While on annual leave, and not on duty as an employee of the Post Office Department, petitioner was arrested on November 19, 1960, in Memphis, Tennessee, on charges of loitering, disorderly conduct, soliciting males and a state charge of carrying a dangerous weapon. The next morning he was tried by the City Court of Memphis, which dismissed the disorderly conduct charge, as well as the charge of soliciting males. He was found guilty of loitering and carrying a dangerous weapon (knuckles) for which he paid a fine of $50.00 for each.

Thereafter, the petitioner received a letter of charges dated December 3, 1960, signed by a Postal Inspector, attached hereto as Appendix D, which was prefaced by the statement that in accordance with the provisions of Sec. 14 of the Veterans' Preference Act, 30 days' notice was being given him that it was proposed to remove him from the Postal Service, or take other disciplinary action, based upon three charges mentioned therein, as fully set forth in copy thereof in Appendix D attached hereto. The postal inspector wrote a statement for the petitioner, which he had him sign and acknowledge and the inspector also acted as notary. Although petitioner claimed he had been coerced in signing same and afraid of losing his job if he

didn't, he was nevertheless removed from his position for "conduct unbecoming a postal employee," after a hearing by an examiner of the Civil Service Commission on March 7, 1961.

He appealed to the Director of the U.S. Civil Service Region in Chicago and advised him that he had not been afforded an administrative hearing. On March 28, 1961, the Director held that the petitioner gave a "reasonably satisfactory reason for the alleged loitering". He found that petitioner had a pair of metal knuckles on his person and that personal observation indicated that petitioner was a person who would carry same for self protection. In his disposition of the other charges, he noted that petitioner was not convicted of soliciting males or disorderly conduct, but gave no further credit to the action of the Court, who heard the evidence and dismissed those charges. He ended up with the conclusion that petitioner's conduct was unbecoming that of a federal employee and that the Post Office Department was justified in removing him for the purpose of promoting the efficiency of the service, although he was not the hearing examiner who usually makes such findings and recommendations. There are no facts, or evidence, found by the hearing examiner or the Director, showing how the alleged conduct of petitioner, as charged by the postal inspector, in any way affected or promoted the efficiency of the service. Respondents herein have shown no reasons or facts why such alleged conduct justified removal for the purpose of promoting the efficiency of the service. Their actions were based on supposed facts and evidence which did not exist and they showed no facts from the alleged conduct that it was necessary to remove him to promote the efficiency of the service. This finding of the Director was merely his own conclusion. He made no finding that petitioner had violated any regulations of the Civil Service Commission.

On September 8, 1961, the Board of Appeals and Review of the Civil Service Commission determined that all the postal inspector's charges were substantiated by a preponderance of the evidence and that his removal was for such cause as will promote the efficiency of the service within the meaning of Sec. 14 of the Veterans' Preference Act, *supra*. The Board stated no facts or reasons as to how the alleged conduct of petitioner, not in the course of his employment, interfered with the promotion of the efficiency of the service, and why it was necessary to remove him in order to promote the efficiency of the service. The facts of this case show clearly that the acts of respondents were arbitrary, capricious, or unreasonable.

Reasons for Granting the Writ

This case presents important questions concerning the removal of Government employees to promote the efficiency of the service, and what constitutes arbitrary or capricious action of a Government Agency, which have not been, but should be, settled by this Court.

1. The Court below has not decided the legal or equitable question as to what constitutes promotion of the efficiency of the service. The decisions are in conflict and a definite decision is necessary.

2. The Court below has not decided what constitutes arbitrary, or capricious action, by a Government Agency. The decisions are in conflict and a definite decision is necessary.

3. The Court below in the case at bar, in effect affirmed *Doe* v. *Halaby*, 317 F. 2d 582, petition for certiorari granted by this Court on February 17, 1964. Misc. No. 452, Oct. Term, 1963. The District Court held that respondents below were entitled to judgment as a matter of law citing

Doe v. Halaby, supra. As the lower Court affirmed said decision, now here on certiorari, it is prayed that a similar writ issue in the case at bar.

4. The writ should be granted for a ruling as to whether it was arbitrary or capricious for respondents to fail to give full faith and credit to the acquittals of the City Court which found that there had been no violation against the public.

5. The writ should be granted for a decision as to whether Sec. 744.12, Postal Manual, is a policy, or regulation and whether it provides for dismissal of postal employees.

Petitioner was not discharged for incompetency in the performance of his duties, or for his current qualifications or fitness for the position, or for his current personality or character. He was removed solely because of alleged conduct while on annual leave, while he was disassociated with his employment and some 500 miles away from his residence and place of employment. At the time, he was engaged in his private life, not employment. His only offense could be against the people of Tennessee of which he was acquitted, save the technical charge of carrying knuckles, which was *malum prohibitum* and not *malum in se*. The conviction of loitering at a bus station condoned even by respondents hardly gave good grounds for his dismissal. The decision of the Court below was a distaste for conduct which had no nexus with Government efficiency. There is no rational basis for a finding that the discharge promoted the efficiency of the service in the absence of some relation between out-of-employment conduct and petitioner's current competence, fitness, or character, as to which respondents produced no evidence whatsoever. Accordingly, if this decision is left unreviewed, it will stand as a precedent authorizing any Government Agency, with the approval of

the Civil Service Commission, to discharge a permanent Government employee on any ground whatsoever, so long as it verbally employs the formula of the statute that the discharge was "for such cause as will promote the efficiency of the service," and any formal declaration to that effect by a Government Agency will not be subject to judicial review.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorneys for Petitioner.

APPENDIX A

ORDER

Upon consideration of the defendants' motion to dismiss or in the alternative for summary judgment, and the plaintiff's motion for summary judgment, the Court having heard oral argument thereon on May 16, 1963, and having considered the written memoranda in support thereof, it appearing to the Court that there are no material issues of fact and that defendants are entitled to judgment as a matter of law, see *Dew v. Halaby*, —— U.S. App. D.C. —— (No. 16741, decided March 28, 1963), it is by the Court this 23 day of May, 1963,

ORDERED That plaintiff's motion for summary judgment be and the same is hereby denied, and it is

FURTHER ORDERED That defendants' motion for summary judgment be and the same is hereby granted.

/s/ LUTHER W. YOUNGDAHL,
Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,013

CLAUDE WALLACE, *Appellant*,

v.

J. EDWARD DAY, POSTMASTER GENERAL, *et al.*, *Appellees*

Appeal from the United States District Court for the District of Columbia

Decided February 6, 1964

Mr. Robert C. Handwerk, with whom *Mr. Sherman C. Shelton* was on the brief, for appellant.

Mr. Robert V. Zener, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General Douglas*, *Messrs. David C. Acheson*, United States Attorney, and *Sherman L. Cohn*, Attorney, Department of Justice, were on the brief, for appellees. *Messrs. Alan S. Rosenthal* and *Morton Hollander*, Attorneys, Department of Justice, also entered appearances for appellees.

Before WILBUR K. MILLER, FAHY and BASTIAN, Circuit Judges.

PER CURIAM: Appellant, a veterans' preference eligible employed by the Post Office Department, appeals from a judgment of the District Court dismissing his complaint for a declaratory judgment that his discharge as a civilian employee of the Post Office Department was illegal, and for related relief.

We find no error in the procedures followed by the officials who participated in the matter. As we said in

Studemeyer v. *Macy*, ——U.S.App.D.C. ——, 321 F.2d 386, 387, *cert. denied*, 375 U.S. 934 (1963).

> "'There may be ground for reasonable differences of opinion as to whether the cause for which the personnel action was taken was grave enough to warrant depriving appellant of his position, but the court is not warranted in substituting a different judgment of its own for that of appellant's superiors, whose action has been sustained by the Civil Service Commission and the District Court.'"

While in our view the punishment for appellant's transgression was too severe, we do not feel warranted in this case in substituting our judgment for that of the departmental authorities and of the Civil Service Commission.

Affirmed.

APPENDIX C

Filed February 6, 1964 Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 18,013

Civil 353-62

CLAUDE WALLACE, *Appellant*,

v.

J. EDWARD DAY, POSTMASTER GENERAL, *et al.*, *Appellees*

Appeal from the United States District Court for the District of Columbia

Before: Wilbur K. Miller, Fahy and Bastian, Circuit Judges

JUDGMENT

This Cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: February 6, 1964.

APPENDIX D

[December 3, 1960]

[Address]

DEAR MR. WALLACE:

In accordance with the provision of Section 14 of the Veterans' Preference Act, this is advance notice to you of at least 30 days that it is proposed to remove you from the postal service or to take other disciplinary action for the following reasons:

Charge No. 1: You are charged with conduct beneath the minimum standards required of postal employees by Section 744.12 of the Postal Manual, in that, by your own admission in an affidavit dated December 2, 1960, while occupying a toilet compartment in the Trailway Bus Station at Memphis, Tenn., for approximately 30 minutes shortly after midnight on the morning of November 18, 1960, you engaged in peeping at the male occupants of a toilet compartment immediately adjacent to the toilet compartment occupied by you, and after observing one occupant of the adjacent compartment apparently fondling his own genitals, you exposed yourself to him for approximately 2 or 3 minutes by inserting your penis into an opening in the separator between these two toilet compartments.

Charge No. 2: You are charged with having in your possession at Memphis, Tenn. on the morning of November 18, 1960 a concealed weapon, namely, metal knuckles, contrary to law.

Charge No. 3: You are charged with having been arrested at Memphis, Tenn. on November 18, 1960, for soliciting males, disorderly conduct, loitering, and carrying a concealed weapon, and to having been convicted in City Court at Memphis, Tenn. on November 19, 1960 for loitering and carrying a concealed weapon.

You are hereby given 5 days from receipt of this letter within which to reply to these charges personally and in writing. You are privileged to furnish affidavits or other evidence in support of your reply. If additional time is needed it will be considered upon written application to me showing the necessity. After the expiration of this period, all the facts in your case including your reply and affidavits, if any, will be given careful consideration by the Department and you will be advised of the decision reached.

Sincerely,

[signed] R. J. DUNNE,
Postal Inspector.

(1672-8)